Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

JOHN S. ROWE,

Petitioner,

v.

H. CHRISTIAN DEBRUYN, *ET AL.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

August 1, 1994

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QUESTION PRESENTED

Whether a prisoner being attacked and raped has a fundamental right, protected by the due process clause of the fourteenth amendment, to defend himself?

LIST OF PARTIES

1. Plaintiff-Petitioner JOHN S. ROWE;

2. Defendant-Respondent James E. Aiken, individually;

3. Defendant-Respondent H. CHRISTIAN DEBRUYN, in his official capacity as Commissioner of the Indiana Department of Correction [hereinafter DOC];[1]

4. Defendant-Respondent JACK R. DUCKWORTH, individually and in his official capacity as Superintendent, Indiana State Reformatory [ISR];

5. Defendant-Respondent MICHAEL J. WATSEN, individually and in his official capacity as Correctional Lieutenant and the Chair of the Conduct Adjustment Board, ISR;

6. Defendant-Respondent LACY MORRIS, individually and in his official capacity as Correctional Officer and Member of the Conduct Adjustment Board, ISR; and

7. Defendant-Respondent RICK L. ROBINSON, Individually and in his official capacity as an employee and member of the Conduct Adjustment Board, ISR.

Defendants-Respondents are hereinafter collectively referred to as Prison Officers.

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[1]Rowe sued Commissioner Aiken individually and in his official capacity. Because Commissioner Aiken was replaced by Commissioner DeBruyn, the Court of Appeals, *sua sponte*, substituted DeBruyn for Aiken. An automatic substitution is effective only with respect to Commissioner Aiken's official capacity. Fed. R. Civ. P. 25(d)(1).

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994). It is reprinted in the Appendix hereto, p. 1a.

JURISDICTION

The judgment and opinion of the court of appeals was entered on March 2, 1994, with one judge dissenting. On March 16, 1994, Rowe filed a petition for rehearing with a suggestion for rehearing *en banc* which was denied on May 3, 1994, with four (4) judges voting to grant an *en banc* hearing. An amended order was entered on May 5, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The district court entered its judgment on December 18, 1992. Rowe filed his notice of appeal on January 15, 1993, within the time limits prescribed by Fed. R. App. P. 4(a). The court of appeals had jurisdiction under 28 U.S.C. § 1291.

Pursuant to 28 U.S.C. §§ 1331 & 1343, the district court had jurisdiction to hear Rowe's constitutional claims brought under 42 U.S.C. § 1983 and 28 U.S.C. § 2201.

CONSTITUTIONAL PROVISION INVOLVED

The following constitutional provision is relevant to the determination of this case: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

In July 1991, Petitioner John S. Rowe was incarcerated in an Indiana state prison. About midnight on July 18, 1991, after the officers had made their last round, Evans, a prisoner in the next cell, sent Rowe a note demanding Rowe to go to his cell in the morning and submit to sex. Affidavit of Rowe to the CAB (Jul. 31, 1991) (AAB-17 to -19).[2] [Rowe's Affidavit]. Evans threatened Rowe with death if he did not comply. *See* Evans' Note (AAB-16) ("Someone will get hurt, perhaps even die"). Rowe did not comply.[3]

Early in the morning, prior to the guards rounds, Evans forcibly entered Rowe's cell and violently assaulted and attempted to rape him. Rowe repeatedly screamed for help, but no officer responded. Rowe's Affidavit (AAB-17 to -19).

During the assault, Evans repeatedly grabbed, pushed, and punched Rowe.[4] While defending himself from Evans'

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[2]References are to the Appendix in the Appellant's Brief (AAB) filed in the Court of Appeals.

[3]Rowe had previously complained to prison authorities about Evans' sexual aggression. Rowe's Affidavit (AAB-17 to -19). *See also* Statement of Counsellor Shelton to the Conduct Adjustment Board (CAB) (AAB-1).

[4]Rowe received several injuries from the attack and was seen by medical staff seven (7) times from July 19 to August 22, 1991. *See* Defendants' Motion for Summary Judgment (attachments-- Rowe's medical records).

violent blows and attempted rape, Rowe grabbed a cold hot-pot and swung it at Evans. Rowe was unable to fend off Evans. Eventually, another prisoner, Perez, heard Rowe's pleas for help and came to his rescue. With Perez' help, Rowe was able to force Evans from his cell. Rowe's Affidavit (AAB-17 to -19).

Rowe was charged with committing battery upon Evans. Conduct Report (AAB-20). A prison conduct adjustment board (CAB) held a hearing and found Evans was the "aggressor," *Watson's Depo.* at 36, and Rowe had acted in self-defense. Affidavit of Watson ¶ 9, at 2 (attached to Prison Officers' summary judgment motion). But, the DOC's policy prevented the CAB from acquitting Rowe. "[Rowe] did have a human right to protect himself, but the Department of Correction doesn't have an allowance for that." *Watson's Depo.* at 38. Thus, the CAB did not allow Rowe to raise the defense of self-defense and specifically held "[t]here is no self-defense policy for offenders in I.D.O.C. [Indiana Department of Correction]." Disciplinary Hearing Report (AAB-21). The CAB convicted Rowe of battery and sentenced him to one (1) year of disciplinary segregation. In imposing its sentence, the CAB viewed the fact of Rowe's self-defense as a mitigating factor and suspended the sentence. *Id.*[5]

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[5]Prison Officers did not raise, in the district court, the question of whether Rowe's sentence deprived him of a liberty interest. Prison Officers' Petition for Rehearing at 4 ("[n]either party raised this issue in the district court"). Nor did Rowe. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (the "movant always bears the initial burden of informing the district court of the basis for its motion). The district court *sua sponte* held a suspended sentence cannot implicate a liberty interest. The court of appeals disagreed. "In our view, Rowe's punishment, although suspended, constitutes 'consequences visited on the prisoner that are qualitatively

Rowe sued. Prison Officers moved for summary judgment claiming security concerns justified their policy of denying prisoners the defense of self-defense in CAB proceedings. The district court agreed. A panel of the court of appeals affirmed, with JUDGE RIPPLE dissenting.

Rowe's petition for rehearing with suggestion for rehearing *en banc* was denied, with JUDGES CUDAHY, FLAUM, RIPPLE, AND ROVNER voting to grant rehearing *en banc*.

REASONS FOR GRANTING THE WRIT

This petition presents the important question whether a prisoner being attacked and raped has a fundamental right, protected by the due process clause of the fourteenth amendment, to defend himself.

This case presents an important constitutional issue which has not yet been decided by this Court, i.e. "whether the state can require someone to accept grievous bodily injury or even the possibility of death as the price for not incurring criminal or quasi-criminal liability." *Rowe*, 17 F.3d 1054 (Ripple, J., dissenting). This Court should accept this case and, for the first time, hold that a human being has a fundamental right to self-defense protected by the due process clause of the fourteenth amendment.

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different from the punishment characteristically suffered by a person convicted of crime.'" *Rowe*, 17 F.3d at 1053 (quoting *Vitek v. Jones*, 445 U.S. 480, 493 (1980)). *See also* Plaintiff's Contentions and Statement of Special Damages ¶ 5, at 3 (AAB-14) (Rowe was later confined to a restrictive, disciplinary unit because a subsequent sentence imposed upon him was enhanced due to this conviction).

Under the Seventh Circuit's decision,[6] a prisoner facing a violent attack or rape must either submit to it or be punished by prison authorities. This rule is neither fair nor just, It makes the state an accomplice of the aggressor. The court of appeals' rejection of the right of self-defense has disastrous consequences in prison:

> [T]he court [of appeals] today holds that the Constitution of the United States permits a state to leave, under all circumstances, an incarcerated person without any lawful recourse against even the most inhuman and vile attack on that person's life or bodily integrity. It sanctions the decision of the state government of Indiana to require that any person incarcerated under its authority submit, no matter what the circumstances, to any threat to life or bodily integrity without any recourse to self-defense of any kind. This holding renders the phrases of *Wolff [v. McDonnell*, 418 U.S. 539, 555 (1974)] meaningless poetry.

Rowe, 17 F.3d 1054 (Ripple, J., dissenting).

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[6]The Seventh Circuit held the right to self-defense is not a fundamental right protected by the due process clause of the fourteenth amendment. *Rowe*, 17 F.3d at 1052. It further held "[e]ven if Rowe did have a constitutional right of self-defense, the IDOC's policy to deny a prisoner the right to raise it as a complete defense is reasonably related to legitimate penological interests." *Id.* at 1053.

A. The right to self-defense is fundamental and protected by the due process clause of the fourteenth amendment.

The right to self-defense is a fundamental right which should be protected by the constitution. "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them." 3 Story, *Commentaries on the Constitution of the United States* 715-716 (1833). *See also Daniels v. Williams*, 474 U.S. 327, 337-38 (1986) (Stevens, J., concurring) ("the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions"). Thus, this Court has recognized a host of rights not enumerated in the constitution when those rights are deemed "fundamental" or "implicit in the concept of ordered liberty." *Roe v. Wade*, 410 U.S. 113, 152 (1973).[7]

The right to self-defense is both fundamental and implicit in the concept of ordered liberty. "Indeed, on practical grounds a liberty to use force in self-defense is essential if members of society are not to be put at the mercy of the strong and unscrupulous." A. Ashworth, *Self-Defence and*

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[7]See *Roe v. Wade*, 410 U.S. 113 (abortion); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (contraception); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (overseas travel); *Rochin v. California*, 342 U.S. 165 (1952) (protection against bodily intrusions); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (upbringing and education of children).

the Right to Life, 34 Camb. L.J. 282, 283 (1975). [hereinafter cited as *Self-Defence and the Right to Life*].

The right to self-defense is the right to survive. It predates written law and is essential to self-preservation. "There is no dispute that self-defense historically is one of the primary justifications for otherwise unlawful conduct." *Martin v. Ohio*, 480 U.S. 228, 243 (1987) (Powell, J., dissenting) (citations omitted).

Perhaps, the earliest written recognition of the right of self-defense is found in "Drakon's Law on Homicide," which was originally drafted by the "lawgiver" Drakon, in 621-20 B.C., and was later enacted by Athenians in 409-08 B.C. M. Gagarin, *Drakon and Early Athenian Homicide Law* 1 (1981). Drakon's law recognized the defense of self-defense and provided that "a plea of self-defense would be entered in a trial for intentional homicide at the Aeropagos (in the fourth century, at least). The defendant could probably be acquitted if he could show that the victim did indeed start the fight and that his own retaliation was a reasonable and necessary defensive action." *Id.* at 62.

The right of self-defense has always been recognized under the English common law:

> In the next place, such homicide as is committed for the *prevention* of any forcible and atrocious *crime* is justifiable by the law of nature; and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared in statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open

> a house, *in the night-time* (which extends also to an attempt to burn it,) and shall be killed in such an attempt, the slayer shall be acquitted and discharged.

2 *Sharswood Blackstone's Commentaries* 180 (Am. ed. 1872).

Of particular relevance to this case is Blackstone's observation that "[t]he Roman law also justifie[d] homicide when committed in defence of the chastity either of one's self or relations". *Id.* "For one uniform principle that runs through our own and all other laws seems to be this,-- that where a crime, in itself capital, is endeavoured to be committed by force, *it is lawful to repel that force by the death of the party attempting.*" *Id.* 180-81 (emphasis added).

The right to self-defense is the right to life. "If a legal system is to uphold the right to life, there must be a liberty to use force for the purpose of self-defense." *Self-Defence and the Right to Life*, 34 Camb. L.J. at 283. The right to life and security of person has also been recognized by international law. "Everyone has the right to life, liberty and security of person." *The Universal Declaration of Human Rights* art. 3 (1948). Further, international law recognizes "[t]he right of the state to intervene by the use of or threat of force for the protection of its nationals suffering injuries within the territory of another state is generally admitted, both in the writings of jurists and in the practice of states." R. Lillich, *International Human Rights, Problems*

of Law, Policy, and Prac. 617 (2d ed. 1991) (quoting D. Bowett, *Self-Defence in Int'l Law* 87-105 (1958)).[8]

Today, self-defense is widely recognized by the states. *See e.g.*, Ind. Code Ann. § 35-41-3-2; Ohio Rev. Code Ann. § 2901.05(A); S.C. Code Ann. §16-23-410. *See also* Model Penal Code § 3.04 (1962) ("the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion").

The Seventh Circuit is the only circuit which has squarely reached the issue and decided that there is no fundamental right to self-defense. *Rowe*, 17 F.3d at 1052. A number of circuits have addressed the issue in either *dicta* or opinions subsequently withdrawn on other grounds. These cases generally deal with the allocation of burden of proof on the defense of self-defense. In *Griffin v. Martin*, 785 F.2d 1172 (4th Cir. 1986), *aff'd by an equally divided court and op. withdrawn*, 795 F.2d 22 (1986) (en banc), *cert. denied*, 480 U.S. 919 (1987), a panel of the Fourth Circuit observed:

> It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a

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[8]The right of self-defense or defense of others has been used on the international scene to justify deploying troops and staging wars to protect one's self or others as in the case of Operations Desert Shield and Desert Storm. It has also been engraved into our culture and upbringing. *See* Grimm, *Hansel and Gretel* (Gretel pushed the wicked witch into the oven to save her brother and herself).

> Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later.

Id. at 1187 n.37. In *Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980) (en banc), *rev'd*, 456 U.S. 107 (1982), Judge Merritt observed "the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law." *Id.* at 1140 (Merritt, J., dissenting on other grounds). In *White v. Arn*, 788 F.2d 338 (6th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987), the court stated "its holding does not reject the notion that a defendant has a limited right to act in self-defense under certain circumstances," *id.* at 347-48 n.15, but declined to adopt the notion that there is a "constitutional right of self-defense, founded in the Eighth, Ninth, and Fourteenth Amendments, which an accused cannot be required to prove." *Id.* at 347.

After all, the right to self-defense is the right to exist. Without it, all other fundamental rights recognized under the constitution would be illusory.

> The future process of law may be by no means an adequate remedy for an injury accompanied with force; and it is impossible to say, to what wanton lengths of rapine or cruelty an outrage of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. *Self-defence, therefore, as it is justly called the primary law of nature, so is not,*

> *neither can it be in fact, taken away by the law of society.*

2 H. Broom, *Commentaries on the Laws of England with Notes by William Wait* 3 (1875) (emphasis added).

B. The right to self-defense extends to prisoners being attacked and raped.

The combination of the Seventh Circuit's decisions in this case and in *Gibbs v. Franklin*, 18 F.3d 521 (7th Cir. 1994) (petition for certiorari filed on June 16, 1994, by the undersigned counsel) is devastating in terms of prisoner safety and human rights. In *Gibbs*, the Seventh Circuit held a prison guard is not constitutionally required to protect a victim-prisoner from an attacker unless the harm to the prisoner is "readily preventable." *Id.* at 524. Having effectively stripped prisoners of the right to be protected by the guards in *Gibbs*, in *Rowe* the Seventh Circuit strips them of the right to protect themselves. Thus, even though, "[p]risons are necessarily dangerous places," *Farmer v. Brennan*, ___ U.S. ___, ___, 114 S. Ct. 1970, 1990 (1994) (Thomas, J., concurring in judgment), the Seventh Circuit has left weak and vulnerable inmates with practically no protection against violence.

Prisons are dangerous places and security inside is often illusory. In this case, Rowe repeatedly yelled for help but no guard came to his aid. Yet, the Seventh Circuit would deny Rowe and other prisoners the right to protect themselves. In the name of judicial restraint, the lower courts have deferred completely to the Prison Officers' bald assertion that the availability of the defense of self-defense

creates a security problem and prisoner-to-prisoner violence. Prison Officers' assertion is not supported by fact or logic. Life inside today's prison is nasty, brutish, and, all too often, short. As Judge Ripple observed, "to forbid all resistance to all threats to life and bodily integrity is not to ensure a lack of violence, as the majority suggests, but to leave the weak and the vulnerable the easy prey of the strong and the vicious." *Rowe*, 17 F.3d at 1055 (Ripple, J., dissenting).[9]

Federal courts must not "abdicate [their] constitutional responsibility to delineate and protect fundamental liberties." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). And, "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in federal or state institution." *Procunier v. Martinez*, 416 U.S. 396, 405 (1974). Deference to prison authorities' purported security concerns cannot be blind:

> My brothers make the further point, however, that the recognition of self-defense in the prison environment poses special problems for the security of the institution and that these considerations justify the abrogation of the defense in the prison setting, even if such a defense must be recognized in other contexts. We have, no doubt, a special obligation to be sensitive to the legitimate requirements of prison security. This obligation brings with

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[9]Imagine the DOC's policy of no self-defense actually being followed. Would aggressive and vicious prisoners be less deterred from attacking other prisoners? To state the question is to answer it.

> it an obligation of deference to the informed judgment of prison authorities with respect to matters of prison administration, especially those issues that implicate matters of security. Yet, the Supreme Court has made it abundantly clear that mere invocation of "security" or "expertise" does not permit a Judge of the Third Article to walk away from the issue.

Rowe, 17 F.3d 1055 (Ripple, J., dissenting) (citing *Martinez*, 416 U.S. at 405).

As Respondent Watson admitted, Rowe "did have a human right to protect himself, but the Department of Correction doesn't have an allowance for that, *Watson's Depo.* at 38 (AAB-33), purportedly in the name of "security concerns." *Rowe*, 17 F.3d at 1053.[10] No governmental purpose which allows an innocent person, *albeit* a prisoner, to be convicted and punished in the name of security can ever be legitimate. Never before has this Court implied that a state may require individuals to passively submit to forcible rape and even death to advance its security concerns.

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[10]True, Prison Officers took the fact of Rowe's self-defense into consideration and mitigated his punishment. Nonetheless, Rowe was convicted and punished for defending himself. *See Watson's Depo.* at 42 ("[i]n the event of a fight where one offender is clearly acting in self-defense, he is still found guilty of it"). This is not just. "It is only just that one who is unlawfully attacked by another, and who has no opportunity to resort to the law for his defense, should be able to take reasonable steps to defend himself from physical harm." LaFave, *Criminal Law* 454 (2d ed. 1986).

> It is indeed a novel proposition of constitutional law to hold that a state, having deprived a person of liberty according to law, can further punish that individual for attempting to stay alive, even when the state itself is not ready, willing, or capable of assuming that responsibility by substituting its own strong arm for that of the prisoner-victim.

Rowe, 17 F.3d 1055-56 (Ripple, J., dissenting).

Lack of protection by prison authorities is "a situation that, the cases of this court [the Seventh Circuit] make clear, occurs with some frequency." *Rowe*, 17 F.3d at 1055 (Ripple, J., dissenting). Because of the exceptional importance of the issue presented, and its impact on the lives of prisoners and the conduct of prison administration, this Court should grant certiorari and, for the first time, hold that the right to self-defense is fundamental and extends to prisoners facing serious injury or death.

CONCLUSION

For the foregoing reasons, Petitioner John S. Rowe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

August 1, 1994

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APPENDIX

The Court of Appeals' Opinion in *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994) a-1

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(REPRODUCED, REPORTED AT 17 F.3D 1047)

In the
United States Court of Appeals
for the Seventh Circuit

No. 93-1141
JOHN S. ROWE,

Plaintiff-Appellant,

v.

H. CHRISTIAN DEBRUYN,* Individually and in his official capacity as Commissioner, Indiana Department of Corrections, JACK R. DUCKWORTH, Individually and in his official capacity as Superintendent, Indiana State Reformatory, MICHAEL J. WATSEN, Individually and in his official capacity as Correctional Lieutenant and the Chair of the Conduct Adjustment Board, Indiana State Reformatory, LACY MORRIS, Individually and in his official capacity as Correctional Officer and Member of the Conduct Adjustment Board, Indiana State Reformatory, and RICK L. ROBINSON, Individually and in his official capacity as an employee and member of the Conduct Adjustment Board, Indiana State Reformatory,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 91 C 1723 - **John D. Tinder**, *Judge*.

ARGUED OCTOBER 26, 1993 -- DECIDED MARCH 2, 1994

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*H. Christian DeBruyn is substituted for his predecessor, James E. Aiken, as Commissioner of the Indiana Department of Correction pursuant to Fed.R.App.P. 43.

Before ESCHBACH, RIPPLE, and KANNE, *Circuit Judges*.

▸**at 2**▸KANNE, *Circuit Judge*. When this case arose, John Rowe was a prisoner at the Indiana Reformatory at Pendleton. On July 29, 1991, prison officers charged Rowe with hitting another inmate, Michael Evans, on the head with a commissary issued "hot pot." Rowe was brought before a Conduct Adjustment Board ("CAB"), consisting of appellees Michael Watsen, Lacy Morris, and Rick Robinson. The CAB found that Rowe had violated prison rules by committing battery, but also found mitigating circumstances because Rowe acted in self-defense. The CAB therefore ordered Rowe to serve one year in disciplinary segregation, but then suspended the penalty of segregation.

Rowe's predicament began early in July 1991, when the Reformatory transferred Michael Evans to a cell adjacent to Rowe's cell. Rowe complained to prison staff about Evans' new cell assignment, apparently because he felt that Evans' proximity might cause trouble. Rowe's fears were soon substantiated. On July 18, Evans wrote Rowe a note demanding that Rowe go to Evans' cell the next morning and engage in sexual activities with him. In the note, Evans accused Rowe of sexually enticing him and threatened that if Rowe did not meet Evans' aroused expectations, "someone will get hurt and perhaps even die."

The next morning during "breakfast feed," Evans entered Rowe's cell. Rowe claims that Evans physically attacked him and attempted to rape him. Rowe yelled out for help, and in an alleged attempt to repel Evans, struck him repeatedly with the unheated hot pot. Another prisoner, Richard Perez, hearing shouts from Rowe's cell, ran in to break up the fight. He found the two men struggling. Perez pulled Evans from Rowe and then helped Rowe push Evans out of the cell. All three men were eventually disciplined.

Before the CAB, Rowe contended that he did not commit battery in violation of prison rules, on the ground that he acted in self-defense. The CAB found that Rowe had violated prison rules "regardless of [his] self-defense plea," ▸**at 3**▸ reasoning that the Indiana Department of Corrections ("IDOC") does not recognize self-defense as a complete defense in a prison disciplinary proceeding. The CAB did acknowledge, however, that self-defense can be a mitigating factor, and it found that the circumstances surrounding the Evans incident mitigated Rowe's penalty of segregation.

Rowe sued various prison officials pursuant to 42 U.S.C. § 1983, claiming that the IDOC's policy of denying prisoners the right to raise self-defense as a complete defense in disciplinary hearings deprived him of due process of law under the federal Constitution.[1] The district court granted the prison officers' motion for summary judgment, holding that because Rowe's penalty of segregation was suspended, the adverse disciplinary ruling against Rowe implicated no protected liberty interest under the Fourteenth Amendment. The district court alternatively held that even if the defendants deprived Rowe of a protected liberty interest, the procedures attendant upon the deprivation were reasonably related to "an essential penological objective" and thus were constitutionally sufficient.

Discussion

The Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law . . . ." We begin by noting several principles that govern our review of prisoners' constitutional claims. A prisoner is "not

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[1]In addition to his due process claim, Rowe also alleged in his complaint that the Department of Correction's policy violated his Eighth Amendment rights; however, Rowe does not raise this issue on appeal.

wholly stripped of constitutional protections when he is imprisoned for crime," *Wolff v. McDonnell*, 418 U.S. 539, 554, 94 S.Ct. 2963, 2975 (1974), and, specifically, he does retain some due process rights under the Fourteenth Amendment. *See, e.g., id.* "There is no iron curtain drawn between the Constitution and the prisons of this country." *Id.* Imprisonment, ▸**at 4**▸however, necessarily entails that an inmate lose many of the rights ordinary citizens enjoy. *Id.*; *Hudson v. Palmer*, 468 U.S. 517, 525, 104 S.Ct. 3194, 3199 (1984). Furthermore, prisons must be able to curtail a prisoner's constitutional rights not only to further correctional goals, such as retribution or deterrence, but also to serve institutional objectives, the most basic of which is the internal security of the prisons themselves. *See Pell v. Procunier*, 417 U.S. 817, 823-24, 94 S.Ct. 2800, 2804 (1974).

We base our review of prison discretion upon the recognition that a prisoner's liberty interests are significantly restricted by the fact of his incarceration, and that prison officials must have broad discretion to dictate policies that promote order and safety for inmates and correctional staff. "Running a prison is an inordinately difficult undertaking that requires expertise . . . peculiarly within the province of the legislative and executive branches of government. . . . [S]eparation of powers concerns counsel a policy of judicial restraint. Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities." *Turner v. Safley*, 482 U.S. 78, 85-86, 107 S.Ct. 2254, 2259 (1987).

With these principles in mind, we consider whether prison officials impermissibly infringed Rowe's Fourteenth Amendment rights when they denied him the right to assert self-defense as a

complete defense to culpability in a CAB disciplinary proceeding.[2] Although the district court decided Rowe's claim as if it were a procedural due process claim,[3] ▸at 5▸we understand Rowe's constitutional challenge to fall under the rubric of substantive due process.

I.

For clarity, we should identify the kinds of claims that may arise when, as Rowe does in this case, an inmate simply alleges that a prison policy "deprives him of his due process rights under the Fourteenth Amendment." In a previous prisoners' rights case, we noted that "the due process clause of the fourteenth amendment is the source of three separate constitutional protections that may serve as the basis of a section 1983 claim against the state and its agents and employees." *Colon v. Schneider*, 899 F.2d 660, 666 (7th Cir. 1990).

> First, the Clause incorporates specific protections defined in the Bill of Rights . . . . Second, the Due Process Clause contains a substantive component that bars certain arbitrary,

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[2]Given our holding, we need not and hence do not reach Rowe's arguments regarding whether the CAB found that Rowe used excessive force, and whether the prison officials were qualifiedly immune from suit.

[3]The district court's findings of fact contained the "related to legitimate penological interests" test associated with substantive due process and Bill of Rights claims, *see e.g., Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987) (fundamental right to marry); *Hadi v. Horn*, 830 F.2d 779 (7th Cir.1987) (First Amendment free exercise); however, the court explicitly rests its holding on procedural due process grounds, and cites only procedural due process cases, *Casteneda v. Henman*, 914 F.2d 981 (7th Cir.1990), *cert. denied*, 111 S.Ct. 1085 (1991), *Gaston v. Taylor*, 946 F.2d 340 (4th Cir.1991) (en banc), *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904 (1989), and *Pardo v. Hosier*, 946 F.2d 1278 (7th Cir.1991), as support.

> wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, [337-38, 107 S.Ct. 677, 677-78 (1986) (Stevens, J., concurring)]. As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken . . . . The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but . . . [i]n procedural due process claims, the deprivation by state action of a constitutionally ▸**at 6**▸protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law . . . . [*Id.*] The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process.

Colon, 899 F.2d at 666 (citing *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975 (1990)).

In this case, clearly Rowe does not allege that the right of self-defense is in the Bill of Rights, incorporated by the Fourteenth Amendment to apply to the States. Rowe also does not claim that the prison could deprive him of his right of self-defense so long as they provided him with notice and a hearing; in fact, our review of the record indicates he did not present any evidence of insufficient process at all.

Rather, he maintains that the IDOC's policy deprived him of a "fundamental liberty," and that "no man should be wrongfully convicted to satisfy the security concerns of a governmental entity." Thus, Rowe is actually arguing against the state's ability to deprive him of his right to claim self-defense at all. Such a claim is most properly characterized as substantive due process. *See Colon*, 899 F.2d at 670-71 (holding that prisoner who alleged

Fourteenth Amendment violation but who could not prove constitutionally deficient process actually stated a substantive, rather than procedural, due process claim). *See also Daniels v. Williams*, 474 U.S. at 339, 106 S.Ct. at 679 (Stevens, J., concurring) ("[A] complaint does not state a valid procedural due process objection--and a valid § 1983 claim--if it does not include a challenge to the fundamental fairness of the State's procedures.").

Rowe principally suggests that the constitutional right to self-defense for prisoners derives from one of the enumerated defenses to culpability set forth as a part of the Indiana Criminal Code, Ind.Code Ann. § 35-41-3-2. However, Rowe also refers to the right to self-defense as an ▸at 7▸ "essential" or "basic" liberty, one that "predates all laws known to . . . mankind." We infer, that by using such terms, Rowe also urges the position that the right to self-defense is a fundamental right without a specific textual basis, inherent in the Due Process Clause itself.

If found to exist, such constitutional rights we review according to the standard set out in *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987). "Under this standard, 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *Id.* at 783-84 (quoting *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987); *O'Lone v. Shabazz*, 482 U.S. 342, 107 S.Ct. 2400 (1987)).

First, we must examine whether there exists a constitutional right of self-defense. We believe that Rowe's argument regarding the provision in the Indiana Criminal Code, Ind.Code Ann. § 35-41-3-2, which provides that "[n]o person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary," is misguided. While it is true that in procedural due process claims, "[a] liberty interest . . . may be created by statute or binding

administrative regulation," *Castaneda v. Henman*, 914 F.2d 981, 983 (7th Cir. 1990), it is because in those claims, the deprivation of a liberty interest itself is not unconstitutional. In procedural due process, it is the lack of predeprivation procedure that offends the Constitution. *See, Daniels v. Williams*, 474 U.S. at 337, 106 S.Ct. at 678 (Stevens, J., concurring) (in procedural due process, "the deprivation may [even] be entirely legitimate--a state may have every right to discharge a teacher or punish a student--but the State may nevertheless violate the Constitution by failing to provide appropriate procedural safeguards."). This is not true in Rowe's case, which supposedly challenges the violation of a substantive federal right.

In *Colon v. Schneider*, 899 F.2d at 660, we held that a prisoner who alleged that he was maced in violation of the Wisconsin Administrative Code could not successfully ▸**at 8**▸"transmute [that] violation of state law into a constitutional violation" by claiming that the state regulation created a substantive federal right under the Due Process Clause of the Fourteenth Amendment. Colon attempted to bring his § 1983 action under the doctrine of procedural due process; however, he failed to allege that the state deprived him of any constitutionally required procedural protections. The court thus held that Colon had stated a substantive, rather a procedural, claim. The court then noted that the actions of a state entity are:

> subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its legality under the state statute can neither add to nor subtract from its constitutional validity. *Mere violation of a state statute does not infringe the federal Constitution.* And state action, even though illegal under state law, can be no more or less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.

Id. at 672 n. 19 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11, 64 S.Ct. 397, 402 (1944)).

The flaw in Rowe's claim is very similar to the one in *Colon*. As in that case, appellant's reliance here on Ind.Code § 35-41-3-2 is merely tantamount to alleging that the appellees have violated state law. "The violation of state law is not itself the violation of the Constitution." *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988) (en banc), *cert. denied*, 489 U.S. 1065, 109 S.Ct. 1338 (1989). We need not decide whether § 35-41-3-2, which relates to criminal prosecutions, actually creates a right to self-defense for prisoners in administrative disciplinary hearings, in order to decide that a state statute is insufficient to "constitutionalize" the right allegedly embodied in it.[4] Accord▸at 9▸ingly, we hold that the Indiana statute cannot create a substantive constitutional right to self-defense.

Next, we consider if the right to self-defense is a fundamental constitutional right within the Due Process Clause itself. We conclude that it is not. First, we find no precedent establishing a

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[4]We note that although Rowe has complained that the conduct of prison officials denied him a statutory defense provided in Indiana's criminal code, he has not raised a state law claim in this case. Rowe alleges only *constitutional* violations by the appellees under § 1983.

Even if Rowe had tried to raise a state law claim in this case, we would not have been in a position to entertain it. This is because the Supreme Court has held that the Eleventh Amendment bars "federal suit[s] against state officials on the basis of state law . . . when . . . the relief sought and ordered has an impact directly on the State itself." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 104 S.Ct. 900 (1984). Because Rowe is challenging the IDOC's self-defense policy as well as the CAB's adverse ruling, the relief Rowe requests would clearly have a direct effect on the State. Thus, in this case, had Rowe actually sought relief based on § 35-41-3-2 we would have been compelled to dismiss his claim, because under *Pennhurst*, "we lack the authority to direct state officials to comply with state law." *Archie*, 847 F.2d at 1216.

constitutional right of self-defense in the criminal law context, *see White v. Arn*, 788 F.2d 338 (6th Cir. 1986), *cert. denied*, 480 U.S. 917, 107 S.Ct. 1370 (1987) (holding that in criminal cases, there is no constitutional right to self-defense founded in the Eighth, Ninth, and Fourteenth Amendments, and that a state may require a defendant to prove self-defense as an affirmative defense to obtain acquittal), although some courts have commented on the matter, *see generally, Griffin v. Martin*, 785 F.2d 1172, 1187 n.37 (4th Cir.), *aff'd & op. withdrawn*, 795 F.2d 22 (1986) (en banc), *cert. denied*, 480 U.S. 919, 107 S.Ct. 1376 (1987) (stating in dictum, "It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later."); *Isaac v. Engle*, 646 ▸**at 10**▸F.2d 1129 (6th Cir. 1980) (en banc) (Merritt, J. dissenting on other grounds), *rev'd*, 456 U.S. 107, 102 S.Ct. 1558 (1982) ("I believe that the Constitution prohibits a state from eliminating the justification of self- defense from its criminal law . . . .").

Furthermore, even a substantive due process right that has been clearly established in Fourteenth Amendment criminal jurisprudence may not necessarily apply to prison inmates in disciplinary proceedings. "Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." *Wolff*, 418 U.S. at 556, 94 S.Ct. at 2975. The Supreme Court has "settled that a prison inmate 'retains those [constitutional] rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system.'" *Turner*, 482 U.S. at 96, 107 S.Ct. at 2265 (quoting *Pell v. Procunier*, 417 U.S. at 822, 94 S.Ct. at 2804).

Given that there is virtually no support for such a judicially created constitutional right in the criminal law, we believe that manufacturing such a right for application in non-criminal, prison

disciplinary proceedings is even less justified. This is particularly so where prison authorities daily face an intractable problem of violence within the prison walls. A right that threatens to undermine prison discipline by encouraging inmates to combat violence with more violence subverts a core prison function of ensuring order and safety within the institution. Without disputing or passing on the primacy of the "right" of self-defense in a criminal law context, we determine that in view of our deference to the administrative discretion of prison authorities, prisoners do not have a fundamental right to self-defense in disciplinary proceedings.

Even if Rowe did have a constitutional right of self-defense, the IDOC's policy to deny a prisoner the right to raise it as a complete defense is reasonably related to legitimate penological interests. The policy purportedly advances prison security by discouraging all physical violence ▸**at 11**▸amongst inmates. It acts as a didact by warning prisoners that violence against another inmate is a unilaterally condemned and perpetually sanctionable violation of prison rules. It also acts as a deterrent because a prisoner who is caught fighting cannot reliably exculpate himself later with a claim of self-defense. In addition, the IDOC's policy does not leave a prisoner with a genuine claim of self-defense without an alternative means of raising the defense in a CAB proceeding, if a disciplinary charge is brought against him. The IDOC policy allows a CAB to consider self-defense in mitigation. In this case, the mitigating factor of self-defense led to a suspension of Rowe's disciplinary segregation, so that the record of rule violation and the possibility of penalty reinstatement were the only consequences Rowe suffered from the CAB's adverse finding. Given that prison security and the reduction of violence are certainly legitimate penological interests, and that appellees' self-defense policy does not absolutely deprive a prisoner of his ability to prove and benefit from a claim of self-defense, we conclude that the IDOC's policy would not have impermissibly infringed Rowe's constitutional rights.

II.

There is a way in which Rowe's claim may be cast as a procedural due process claim. We may convert all of Rowe's arguments for the right to self- defense into an allegation that the CAB proceeding itself was constitutionally deficient procedure because it did not admit self-defense as a complete defense. None of the parties seem to view the issue in this way in their briefs. As we mentioned above, Rowe makes no argument that he received constitutionally deficient procedure before the appellees deprived him of a protected liberty interest. However, the district court bases its findings at least in part on procedural due process grounds, so we will briefly analyze Rowe's claim from a procedural viewpoint.

In *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 109 S.Ct. 1904 (1989), the Supreme Court set out ▸**at 12**▸a two step analysis for reviewing the procedural due process claims of prisoners. "[T]he first [step] asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally deficient." *Id.* at 460, 109 S.Ct. at 1908.

The district court held that because Rowe's penalty had been suspended, and he "suffered no tangible punishment as a result of the disciplinary proceeding," the CAB's sanction did not implicate a protected liberty interest. We disagree that Rowe's penalty of one year of disciplinary segregation was insufficient to trigger the procedural protections guaranteed by the Fourteenth Amendment. In our view, Rowe's punishment, although suspended, constitutes "consequences visited on the prisoner that are qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek v. Jones*, 445 U.S. 480, 493,

100 S.Ct. 1254, 1263 (1980). The case the district court cites, *Gaston v. Taylor*, 946 F.2d 340 (4th Cir. 1991) (en banc), is inapposite here. In *Gaston*, the prisoner received a 15 day segregation penalty that was suspended contingent on the requirement that the prisoner remain on good behavior for 90 days. Rowe's penalty was a full year of segregation that will not be forgiven or withdrawn for any reason until the end of his prison time. We do not think that prison officials may find a prisoner in violation of prison rules, then subject him to the open-ended threat of a year of disciplinary segregation without implicating a protected liberty interest.

We thus turn to examine whether Rowe received constitutionally sufficient procedure. The only complaint we can divine Rowe as having with the CAB proceeding is that he was unable to assert self-defense as a complete defense. He received notice, a hearing, and a written statement of evidence relied upon and reasons for the disciplinary action.

"Due process is a flexible concept, the import of which is to provide an opportunity to be heard." *Castaneda v.* ▸**at 13**◂*Henman*, 914 F.2d 981, 985 (7th Cir. 1990). The Supreme Court set the standard governing the procedural protections required by the Due Process Clause in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893 (1976). *Mathews* established that due process analysis must "weigh the risk of an erroneous deprivation of [a private interest] through the procedures used" and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335, 96 S.Ct. at 903. Rowe may be said to have been deprived of his opportunity to be heard with regard to his defense of self-defense. However, the IDOC's pre-punishment procedures accommodated Rowe by allowing him to raise self-defense in mitigation. Thus, Rowe was not wholly deprived of the defense of self-defense--indeed, he was allowed to argue and present evidence on the issue. Rowe was

barred simply from using self-defense as a complete justification to his disciplinary charge of battery. This accommodation of Rowe, weighed against the IDOC's interest in refusing to recognize self-defense as a complete defense in order to discourage prison violence, allows the self- defense policy to survive constitutional scrutiny. We conclude that even if Rowe were to have stated a procedural due process claim, the IDOC's policy regarding self-defense does not render the CAB proceeding insufficient procedure.

Conclusion

For the foregoing reasons, the district court's grant of summary judgment to the appellees is AFFIRMED.

▸AT 14▸ RIPPLE, *Circuit Judge*, dissenting.

While reciting the admonition of *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 2974 (1974), that "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime," and reminding us that there "is no iron curtain drawn between the Constitution and the prisons of this country," *id.* at 555-56, the court today holds that the Constitution of the United States permits a state to leave, under all circumstances, an incarcerated person without any lawful recourse against even the most inhuman and vile attack on that person's life or bodily integrity. It sanctions the decision of the state government of Indiana to require that any person incarcerated under its authority submit, no matter what the circumstances, to any threat to life or bodily integrity without any recourse to self-defense of any kind. This holding renders the phrases of *Wolff* meaningless poetry.

I do not believe that it is hyperbole to characterize the position of the majority as a novel one. As the majority implicitly admits, no court has ruled directly on whether the state may, consistent

with the due process clause, impose, as a matter of absolute liability, a sanction for protecting oneself from death or bodily harm. There is indeed authority for the proposition that there is no "constitutional right of self-defense, founded in the Eighth, Ninth, and Fourteenth Amendments, which an accused cannot be required to prove." *White v. Arn*, 788 F.2d 338, 347 (6th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987). However, as even the majority seems to acknowledge, the question of the allocation of burden of proof, the issue before the court in *White* and similar cases, is different from the issue of whether the state can require someone to accept grievous bodily injury or even the possibility of death as the price for not incurring criminal or quasi-criminal liability. As Judge Murnaghan of the Fourth Circuit has written:

> It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson's choice of almost cer▸at **15**▸tain death through violent attack now or statutorily mandated death through trial and conviction of murder later.

Griffin v. Martin, 785 F.2d 1172, 1187 n.37 (4th Cir.), *aff'd by an equally divided court and op. withdrawn*, 795 F.2d 22 (1986) (en banc), *cert. denied*, 480 U.S. 919 (1987). *See also* John C. Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions and Burden of Proof in the Criminal Law*, 88 Yale L.J. 1325, 1366-79 (1979) (suggesting that self-defense is so critical to the concept of criminal responsibility and has such substantial effects on a defendant's liberty that to allow a conviction where reasonable doubt as to self-defense remains would be inconsistent with the fundamental notions of fairness that underlie the State's duty to establish criminal liability).

My brothers make the further point, however, that the recognition of self-defense in the prison environment poses special problems for the security of the institution and that these considerations justify the abrogation of the defense in the prison

setting, even if such a defense must be recognized in other contexts. We have, no doubt, a special obligation to be sensitive to the legitimate requirements of prison security. This obligation brings with it an obligation of deference to the informed judgment of prison authorities with respect to matters of prison administration, especially those issues that implicate matters of security.[1] Yet, the Supreme Court has made it abundantly clear that the mere invocation of "security" or "expertise" does not permit a Judge of the Third Article to ▸**at 16**▸ walk away from the issue.[2] There must be a demonstration on the part of the prison authorities that the deprivation in question is indeed "reasonably related to legitimate penological interests" of the corrections system. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The principal reason offered by the majority has a superficial appeal. The absence of self-defense, it maintains, fosters a peaceful environment within the prison walls because it acts as a deterrent to all violence. A prisoner caught fighting, it reasons, cannot reliably exculpate himself later with a claim of self-defense. Yet, we are told in the following sentence, a prisoner can claim self-defense in mitigation of punishment, thus, it would seem, destroying a good deal of the supposed deterrent.

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[1]*See, e.g., Block v. Rutherford*, 468 U.S. 576, 584-85 (1984) (stating that security considerations are "peculiarly within the province and professional expertise of corrections officials") (citations omitted); *Pardo v. Hosier*, 946 F.2d 1278, 1280 (7th Cir.1991) (stating that "prison administrators must be accorded wide-ranging deference in the ... execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security") (citations omitted).

[2]*See, e.g., Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (stating that, although courts must show deference in dealing with problems of prison administration, "a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution").

The difficulty with the majority's position is its assumption that the self-defense afforded to prisoners would have to be the same as that available in the general community and could not take into consideration the difficult circumstances of modern prison life. It may well be that self-defense in the prison environment ought to be available as a defense of extreme last resort and available only when the prisoner can establish that he cannot rely on the state to protect him, a situation that, the cases of this court make clear, occurs with some frequency. But to forbid all resistance to all threats to life and bodily integrity is not to ensure a lack of violence, as the majority suggests, but to leave the weak and the vulnerable the easy prey of the strong and the vicious. It is indeed a novel proposition of constitutional law to hold that a state, having deprived a person of liberty according to law, can further punish that individual for attempting to stay alive, even when ▸**at 17**▸the state itself is not ready, willing, or capable of assuming that responsibility by substituting its own strong arm for that of the prisoner-victim.[3]

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[3]It ought to be pointed out that the Indiana legislature actually might afford prisoners more protection than the majority assumes. Indiana Code Ann. § 35-41-3-2 states that "[n]o person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary." Whenever we interpret a statute, we must begin with the plain meaning of that statute. Notably, the Indiana statute reserves the right of self-defense to any situation in which a "person" is put "in legal jeopardy of *any kind whatsoever*." Ind.Code Ann. § 35-41-3-2 (emphasis added). As the majority quite graphically points out in the latter part of it opinion, the consequences of the disciplinary hearing in this case were indeed significant and can quite comfortably fit with the term "legal jeopardy of any kind whatsoever." The constraints of the Eleventh Amendment, as interpreted in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), preclude our entertaining a claim for relief based only on state law. Any remedy on this basis must be sought in the Indiana courts.

(REPRODUCED)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: March 2, 1994

BEFORE: **Honorable** JESSE E. ESCHBACH, Circuit Judge
Honorable KENNETH F. RIPPLE, Circuit Judge
Honorable MICHAEL S. KANNE, Circuit Judge

No. 93-1141
JOHN S. ROWE,

Plaintiff - Appellant,

-- v.

H. CHRISTIAN DEBRUYN, individually and in his official capacity as Commissioner of the Indiana Department of Correction,
JACK R. DUCKWORTH, individually and in his official capacity as Superintendent, Indiana State Reformatory,
MICHAEL J. WATSEN, individually and in his official capacity as Correctional Lieutenant and the Chair of the Conduct Adjustment Board, Indiana State Reformatory, et al.,

Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division
No. 91 C 1723, John D. Tinder, Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.
(1061-110393)

(REPRODUCED)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 3, 1994

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

JOHN S. ROWE, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 93-1141 v.	)	
H. CHRISTIAN DEBRUYN,[1] Individually and in his official capacity as Commissioner, et al., Defendants-Appellees.	)	No. 91 C 1723 John D. Tinder, Judge.

ORDER

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[1]H. Christian DeBruyn is substituted for his predecessor, James E. Aiken, as Commissioner of the Indiana Department of Correction pursuant to Fed. R. App. P. 43.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the judges[2] in active service have voted to deny rehearing en banc. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing with suggestion for rehearing en banc is DENIED; IT IS FURTHER ORDERED that the petition for rehearing is hereby DENIED.

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[2] Judges Cudahy, Flaum, Ripple, and Rovner voted to grant rehearing en banc.

(REPRODUCED)

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

May 5, 1994

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JESSE E. ESCHBACH, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge

JOHN S. ROWE, Plaintiff-Appellant,	)	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 93-1141 v.	)	
H. CHRISTIAN DEBRUYN,[1] Individually and in his official capacity as Commissioner, et al., Defendants-Appellees.	)	No. 91 C 1723 John D. Tinder, Judge.

AMENDED ORDER

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[1]H. Christian DeBruyn is substituted for his predecessor, James E. Aiken, as Commissioner of the Indiana Department of Correction pursuant to Fed. R. App. P. 43.

The order issued in this case on May 3, 1994, is vacated and the following order is entered.

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause, a vote of the active members of the Court was requested, and a majority of the judges[2] in active service have voted to deny rehearing en banc. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the petition for rehearing with suggestion for rehearing en banc filed by the plaintiff-appellant is DENIED;

On consideration of the petition for rehearing filed by the defendants-appellees in the above-entitled cause, all of the judges of the original panel have voted to deny a rehearing. Accordingly,

IT IS FURTHER ORDERED that the petition for rehearing filed by the defendants-appellees is hereby DENIED.

IT IS FURTHER ORDERED that the opinion issued on March 2, 1994 is hereby modified as follows:

The first full paragraph on page 12, next-to-last sentence, strike the words "that will not be" and replace with ", and the record does not reveal whether his penalty will be".

---

[2] Judges Cudahy, Flaum, Ripple, and Rovner voted to grant rehearing en banc.

(REPRODUCED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN S. ROWE,	)	
	)	
Plaintiff,	)	Cause No. IP 91-1723-C
vs.	)	
	)	
JAMES E. AIKEN, *et al.*,	)	
	)	
Defendants.	)	

JUDGMENT

The Court having this day made its Entry in the above cause,

IT IS NOW THEREFORE ADJUDGED AND DECREED that the defendants' motion for summary judgment is **GRANTED** and this cause of action is **DISMISSED WITH PREJUDICE.**

John Daniel Tinder [STAMPED]

JOHN DANIEL TINDER, Judge
United States District Court

Date: DEC 13 1992

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David A. Nowak
Deputy Attorney General
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Indianapolis, Indiana 46204

(REPRODUCED)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JOHN S. ROWE,	)	
	)	
Plaintiff,	)	Cause No. IP 91-1723-C
vs.	)	
	)	
JAMES E. AIKEN, *et al.*,	)	
	)	
Defendants.	)	

ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION FOR SUMMARY JUDGMENT AND ORDER DIRECTING ENTRY OF JUDGMENT

This cause is before the Court on the plaintiff's amended complaint, on the defendants' answer, on the defendants' motion for summary judgment and on the plaintiff's response to such motion.

Whereupon the Court, having read and examined such complaint, answer, motion and supporting and opposing materials, and being duly advised, now makes the following findings of fact and conclusions of law and Order.

Findings of Fact

1. Plaintiff John S. Rowe is an inmate at the Indiana Reformatory. On July 29, 1991 Rowe was charged with "committing battery upon another person." He was notified of the charge and of his procedural rights in connection with it on July

30, 1991, at which time he requested a lay advocate and several witnesses.

2. On August 1, 1991 a disciplinary hearing was held before a conduct adjustment board consisting of Lt. Watson and correctional officers Morris and Robinson. After considering information from various sources, the conduct board found Rowe guilty of the offense as charged. However, because of mitigating circumstances, it imposed only one year of disciplinary segregation and suspended the imposition of that sanction.

3. The conduct board found that, up to a point, Rowe acted in self-defense. Beyond that point, however, Rowe's action in hitting his assailant passed from self-defense to battery.

4. In this action, filed December 30, 1991, Rowe claims that the members of the conduct board violated his federally protected rights by not recognizing his plea of self-defense. He has broadened his claim to include the former Commissioner of the Indiana Department of Correction and the Reformatory Superintendent as defendants. He seeks declaratory and injunctive relief (expungement of the misconduct report and results) and money damages. Each defendant is sued in both his individual and official capacities.

5. The Department of Correction does not recognize, in express terms, a defense of self-defense for a prison disciplinary proceeding. The defendants' rationale for this is that in the correctional setting a contrary policy "would only encourage offenders to use force in the name of self-defense and . . . would only add to the number of assaults by inmates on other inmates." The Department of Correction does recognize, however, that self-defense can be a mitigating factor and takes that into consideration in (a) determining what offense is appropriate and (b) determining what sanction is appropriate. Self-defense, therefore, is not a complete defense.

6. The defendants have appeared by counsel and seek the entry of summary judgment. The plaintiff has opposed the motion. Any conclusion of law stated below, to the extent that it

constitutes a finding of fact, is herein incorporated by reference as an additional finding of fact by the court.

Conclusions of Law

Based on the foregoing Findings of Fact, the Court now enters the following Conclusions of Law.

1. The plaintiff's action is brought pursuant to 42 U.S.C. § 1983, which provides a cause of action to redress the violation of federally secured rights by a person acting under color of state law. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984). The first inquiry in every Section 1983 case is whether there has been the deprivation of a right secured by the Constitution or laws of the United States, for without a predicate constitutional violation, one cannot make out a prima facie case under § 1983. *Juriss v. McGowan*, 957 F.2d 345, 349 n.1 (7th Cir. 1992), citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979).

2. The Fourteenth Amendment to the United States Constitution prohibits a state from depriving all persons, including inmates, of life, liberty, or property without due process. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974). It is, of course, well understood that state inmates suffering the loss of a protected liberty or property interest have limited due process rights in the context of prison disciplinary proceedings. *Id.* at 561.

3. Under *Wolff*, the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity to call witnesses and present documentary evidence in his defense if consistent with institutional safety and correctional goals; and (3) a written statement by an impartial factfinder of evidence relied on and the reasons for disciplinary action. *Id.*, 418 U.S. at 563-567. In addition, there is a substantive component to the protections to which an inmate is entitled. That is, there must be "some evidence" supporting the decision made by the conduct board. *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445, 455 (1985)

4. These protections, however, are triggered not by the fact of a disciplinary proceeding but by whether the disciplinary

sanction which he received implicated a protected liberty interest. *Castenada v. Henman*, 914 F.2d 981, 983 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1085 (1991).

> Contrary to Castenada's assertion, the due process rights mandated by *Wolff* turn not upon the mere fact of discipline, but upon whether the disciplinary sanction imposed by prison officials implicates an inmate's liberty interest. *Wolff*, 418 U.S. at 557. Thus, the relevant question to this appeal is not whether Castenada was in fact disciplined but whether the disciplinary sanction which he received implicated a protected liberty interest.

Id.

5. In *Gaston v. Taylor*, 946 F.2d 340 (4th Cir. 1991) (en banc), the court concluded that a prisoner could not claim violation of *Wolff* where he received a suspended sentence of isolation, requiring him to serve no time in isolation and bringing about no change in the length or conditions of his original sentence. The same reasoning applies here. Rowe suffered no tangible punishment as a result of the disciplinary proceedings, nor has he identified any impact of the misconduct finding on the length of his confinement.

6. Even if the defendants deprived Rowe of a liberty interest, it does not necessarily follow that his rights have been violated, for the second question which must be answered in such an event is "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dept. of Corrections v. Thompson*. 109 S. Ct. 1904, 1908 (1989).

7. *Wolff* did not recognize, nor has its progeny established, an inmate's right to assert a claim of self-defense as a complete defense to misconduct charges involving the use of violence. The touchstone of due process is freedom from arbitrary governmental action, *Wolff*, 418 U.S. at 558, but "[p]rison disciplinary

proceedings are not part of a criminal prosecution, and full panoply of rights due a defendant in such proceedings does not apply." *Id.* at 556. The defendants have established, through defendant Watsen's affidavit, the DOC policy which does not recognize self-defense as a complete defense is far from arbitrary. On the contrary, it represents a reasonable, though not inevitable, response to the intractable problem of violence within a prison's walls. As explained in *Pardo v. Hosier*, 946 F.2d 1278, 1280-81 (7th Cir. 1991):

> In evaluating constitutional claims of prisoners, we must balance the need to protect prisoners' procedural rights against the need for prison safety and security. *Redding v. Fairman*, 717 F.2d 1105, 1112 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S. Ct. 1282 (1984). In prison disciplinary proceedings, "prison administrators must be 'accorded wide-ranging deference in the . . . execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Mathews v. Fairman*, 779 F.2d 409, 415 (7th Cir. 1985) (quoting *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S. Ct. 1861 (1979)).

8. The DOC policy makes inmates aware the violence directed to another person, including another inmate, is always a violation of institutional rules. This policy is not arbitrary and is certainly linked to an essential penological objective in a way which should not be second-guessed by the courts.

9. In any event, this case does not squarely present the issue of whether the DOC's self-defense policy impermissibly impinges on a due process interest, for Rowe's conduct exceeded the limits of self-defense. This renders the DOC's policy regarding inmates' claims of self-defense irrelevant to the disposition of Rowe's case. Further, although Rowe disputes the extent and need for the force

he used, this is merely a matter of credibility which may not be redetermined here. The role of a reviewing court is limited to determining whether there was sufficient evidence to support the committee's decision. *Superintendent v. Hill*, 472 U.S. 445 (1985).

10. "The Constitution does not require that the evidence relied upon logically preclude any conclusion but the one reached by the disciplinary board . . . ." *Culbert v. Young*, 834 F.2d 624, 631 (7th Cir. 1987). Based on this standard, therefore, the Court may not weigh the "conflicting" evidence which the conduct board may have considered. *Viens v. Daniels*, 871 F.2d 1328, 1334-35 (7th Cir. 1989); *McKinney v. Meese*, 831 F.2d 728 (7th Cir. 1987). Judicial review under *Hill* is limited. Rowe is not entitled to a new trial or a *de novo* opportunity to persuade a new factfinder of what did or did not occur.

11. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue of material fact exists only where 'there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.'" *Dribeck Importers, Inc. v. G. Heileman Brewing Co.*, 883 F.2d 569, 573 (7th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)). In considering such a motion, the court must view all inferences in the light most favorable to the nonmoving party. *See Regner v. City of Chicago*, 789 F.2d 534, 536 (7th Cir. 1986).

12. Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. That is precisely the case here. Considering the particular sanction which was imposed, Rowe's claim fails at the

outset because he did suffer the loss of a protected liberty interest. Beyond this, however, there was no arbitrary action in any aspect of the charge, disciplinary proceeding or sanction involved in the events identified in this action and there was no constitutional infirmity in the proceeding which would entitle Rowe to relief in this case. The defendants have shown that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law.

ORDER

Based on the foregoing,

IT IS THEREFORE ORDERED that the defendants' motion for summary judgment is **GRANTED.** Judgment consistent with this Entry shall now issue.

John Daniel Tinder [STAMPED]

JOHN DANIEL TINDER, Judge
United States District Court

Date: DEC 18 1992

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Supreme Court, U.S.
FILED
OCT 20 1994
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

No. 94-249

JOHN S. ROWE, *Petitioner*,

v.

H. CHRISTIAN DeBRUYN, JACK DUCKWORTH, MICHAEL J. WATSEN, LACY MORRIS, and RICK L. ROBINSON, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a prisoner's due process rights are violated when he receives no punishment in a prison disciplinary because the disciplinary body considers self-defense a mitigating factor, but does not permit the prisoner to assert self-defense as a complete defense in the disciplinary proceeding?

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In The
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents H. Christian DeBruyn, Commissioner of the Indiana Department of Correction, et al., hereby oppose John S. Rowe's Petition for a Writ of Certiorari to the Court of Appeals for the Seventh Circuit.

STATEMENT OF THE CASE

John Rowe, then a prisoner at the Indiana Reformatory, was brought before a prison disciplinary body known as a Conduct Adjustment Board on August 1, 1991, charged with

battery. a-25.[1] The Board, consisting of the three correctional officers who are defendants in this case, concluded that Rowe had struck another prisoner, Michael Evans, on the head with a hot pot. Id. The Board imposed punishment of one year in disciplinary segregation but suspended the sentence because it considered Rowe's claim of self-defense to be a mitigating circumstance. Id.

According to Rowe, Evans instigated the fight that led to his sanction. a-2. Evans entered Rowe's cell, and Rowe contends that Evans struck him first. Id. Rowe contends that Evans entered Rowe's cell to rape Rowe. Id. There also was evidence that Rowe had made sexual advances to Evans, AAB 24, 33, but the Board made no finding on the issue. The fight was broken up by guards and another inmate, Richard Perez. Id.

Rowe, Evans and Perez all were disciplined for the incident, although the record does not reveal the punishments given Evans and Perez. Perez was disciplined because his presence in Rowe's cell, even to break up a fight, violated prison rules. AAB 25-27.

In deposition testimony on which Rowe relied, one member of Rowe's Conduct Adjustment Board and the Superintendent of the Reformatory testified that self-defense cannot be a complete defense in a Board hearing. AAB 31, 40. The Board member stated in his affidavit that "[a]ny act of violence or assaultive behavior by an inmate against another inmate must result in the filing of a conduct report and a guilty finding to deter such violence." S.A.3. The

[1] Citations to the appendix of the Petition for Certiorari are referred to as "a-___." Respondents adopt Petitioner's notation of "AAB ___" for Petitioner's Record Appendix in the Court of Appeals. Respondents' citations to "S.A.___" refer to Respondents' Supplemental Appendix in the Court of Appeals.

Board member stated that recognizing self-defense as a complete defense "would only encourage offenders to use force in the name of self-defense and would provide a recognized excuse for the use of force." Id. He also testified that:

> In the event of a fight where one offender is clearly acting in self-defense, he is still found guilty of it. If not, that's giving other offenders the green light to go ahead and act out as they feel -- any conduct reports that we have for any act of violence, if they get enough witnesses to say they were acting in self-defense, that just gives other offenders the green light to go out with a shank or whatever and just do whatever they feel like doing to other offenders, and I feel it would just have an adverse effect on the security of the institution.

AAB 34.

The Board member also testified that the Board concluded that while Rowe initially may have acted in self-defense, he ultimately used excessive force against Evans, striking him three times on the head with a hot pot. AAB 33; S.A. 2. The District Court agreed that he used excessive force. a-25. The Board determined, however, that Rowe's defense of himself against Evans's aggressive actions constituted mitigating circumstances and, therefore, suspended the penalty. AAB 33; S.A. 2. "[W]hen self-defense is proven, the Conduct Adjustment Board takes that factor into account and may change that charge to a lesser offense or consider self-defense as a mitigating factor in the sanction imposed." S.A. 4.

Rowe filed his complaint pursuant to 42 U.S.C. § 1983 on December 30, 1991. AAB 10. He named as defendants James E. Aiken, former Commissioner of the Indiana Department of Correction; Jack Duckworth, Superintendent of the Indiana Reformatory; and Michael J. Watsen, Lacy Morris and Rick L. Robinson, correctional officers who were members of the Conduct Adjustment Board that heard Rowe's case.

The District Court granted summary judgment in favor of Defendants. a-24. The District Court ruled that because Rowe had received a suspended sentence based on his claim of self-defense, and neither served time in segregation nor lost sentence credits, the disciplinary proceeding did not affect any protected liberty interest. a-27. The District Court also ruled that Indiana's policy not to recognize self-defense as a complete defense in prison disciplinary cases was a reasonable exercise of correctional judgment. a-28.

The Court of Appeals affirmed, rejecting Rowe's argument that an Indiana statute conveyed on him a liberty interest in asserting self-defense. a-6 to -7. Then, for the first time analyzing Rowe's claim under the rubric of substantive due process, the Court of Appeals ruled that there is no constitutional right for a person in Rowe's position to assert self-defense. a-9 to -10. Finally, the Court of Appeals ruled that even if there were a constitutional right to self-defense, Indiana could lawfully decline to recognize such a right in the correctional context in order to promote orderly prison administration. a-11. Rowe petitioned for rehearing with suggestion for hearing en banc. The Court of Appeals denied the petition on May 3, 1994. a-19. Respondents also petitioned for rehearing. Their petition was denied May 5, 1994, although the Court of Appeals amended its opinion based on Respondents' petition. a-22.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Because Rowe actually was permitted to raise self-defense in his prison disciplinary proceeding and his claim of self-defense caused his sentence to be suspended, this case does not present the question stated in the Petition for Certiorari. Moreover, Rowe has waived any claim that he has a substantive due process right to assert self-defense because he did not raise that claim in the District Court. Below, he only contended that an Indiana statute gave him the right to raise self-defense.

The question in this case is not of sufficient importance to justiify certiorari. The issue has not been the subject of any other reported case and there is no conflict between the decision of the Seventh Circuit and the decision of any other Court of Appeals or State court. The Seventh Circuit's decision is correct because the right to self-defense is not sufficiently well-established, especially for prison inmates, to rise to the level of a fundamental right guaranteed by the Due Process Clause.

I. THIS CASE DOES NOT ACTUALLY PRESENT THE QUESTION IN THE PETITION.

Because Rowe was afforded the opportunity to present his defense of self-defense in the prison disciplinary proceeding, this case does not afford the Court an opportunity to decide the "Question Presented" in the Petition for Certiorari. Moreover, because Rowe's sentence was suspended based on his claim of self-defense, and no term or condition of his confinement was altered as a result, he has no claim for relief at this stage of the litigation. See a-27

(District Court holds that no liberty interest was affected by prison disciplinary case against Rowe).

Rowe's statement that the State "did not allow Rowe to raise the defense of self-defense," Petition at 3, is false. He was permitted to raise self-defense, not as a complete defense, but as mitigation which in this case precluded any punishment. The Conduct Adjustment Board that heard his case accepted self-defense as a mitigating factor and completely suspended Rowe's sentence. Id. He was not punished for his infraction, but received only a suspended sentence of one year in segregation. Id. On July 18, 1992, when a year had passed from the date of his Conduct Adjustment Board hearing, the threat that any part of his sentence of segregation would be imposed was eliminated. See Indiana Department of Correction Adult Disciplinary Policy and Procedures at G.23.C(4).

II. ROWE WAIVED HIS SUBSTANTIVE DUE PROCESS CLAIM BY NOT RAISING IT IN THE DISTRICT COURT.

Rowe did not make a substantive due process claim in the District Court although it is the centerpiece of his Petition for Certiorari. In the trial court, Rowe only argued that Ind. Code § 35-41-3-2, which codifies the defense of self-defense in Indiana's criminal code, applied to his prison disciplinary proceeding or created a liberty interest under the Fourteenth Amendment. a-9.[2] By failing to raise this argument in the District Court, Rowe has waived it. City of

[2] The Court of Appeals rejected this argument. a-9. The District Court did not even reach this argument because it found that Rowe was deprived of no liberty interest because the suspended sentence he received brought about no change in the length or condition of his original sentence. a-27 (citing Gaston v. Taylor, 946 F.2d 340 (4th Cir. 1991) (en banc).

Springfield v. Kibbe, 480 U.S. 257, reh. denied, 481 U.S. 1033 (1987).

Moreover, because Rowe did not raise the substantive due process point until his appeal, the record is inadequate for certiorari. Because the substantive due process issue was not raised until this matter reached the Court of Appeals, the Respondents were not able to develop a full record in the trial court relating to whether the Constitution recognizes a substantive due process right to self-defense in prison disciplinary proceedings.

III. THIS CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW.

The question presented in this case is not an "important question of federal law," so certiorari is not appropriate under Sup.Ct.R.10.1(c). Rowe offers no reason why the question whether there is a "fundamental right" to assert self-defense as an absolute defense in prison disciplinary proceedings has significance outside this litigation. In fact, the question is of little more than academic interest to Rowe himself.

There is no other reported litigation raising this issue in any other jurisdiction. Neither Rowe in his Petition, the Court of Appeals in its opinion, nor Respondents has found any other reported case that analyzes whether self-defense is a "fundamental right" for prisoners in prison disciplinary proceedings. In the heavily-litigated area of prisoners' rights, the lack of other litigation raising this issue shows that it is not an "important question of federal law which has not been, but should be, settled by this Court." Sup.Ct.R.10.1(c).

The question Rowe raises in his Petition for Certiorari is not even an "important question" to Rowe himself. As discussed above, Rowe was allowed to assert self-defense

and, in his case, his imprecation of self-defense precluded him from suffering any actual punishment. Because self-defense mitigated his sentence, Rowe suffered no harm as a result of the policy he challenges in this case.

Also, no other United States Court of Appeals or highest State court has ruled in conflict with the Seventh Circuit on this issue. The Seventh Circuit's decision is consistent with the only other case the parties have found that deals with the issue, White v. Arn, 788 F.2d 338 (6th Cir. 1986), cert. denied, 480 U.S. 917 (1987). White found that there is no constitutionally-protected right to self-defense. Similarly, other courts have rejected the notion that familiar criminal law defenses are enshrined by the due process clause. Glass v. Blackburn, 791 F.2d 1165, 1171 (5th Cir. 1986), cert. denied, 481 U.S. 1042 (1987)(duress); State v. Cowan, 861 P.2d 884, 889 (Mont. 1993), cert. denied, 114 S.Ct.1371 (1994) (insanity).

Because there is no indication that the question Rowe presents in his Petition for Certiorari is an "important question," this Court should deny the petition.

IV. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The Seventh Circuit correctly decided that there is no fundamental constitutional right to self-defense for a prisoner in a prison disciplinary proceeding. a-9 - a-10. In its present posture, the question before the Court is whether such a right is conveyed as an element of substantive due process. a-6. To qualify as fundamental under substantive due process analysis, rights must be "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [they] were sacrificed.'" Bowers v. Hardwick, 478 U.S. 186,

191-92, reh. denied, 478 U.S. 1039 (1986) (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937)).

Although the common law or statutory right to self-defense is clearly established in many States in some form, the doctrine is not so universal as to render it fundamental for purposes of substantive due process. The doctrine is embodied in statutes in at least thirty-four States, but its scope and prerequisites vary greatly from one jurisdiction to another. See Sloan, Law of Self-Defense at 55-95 (1987) (quoting self-defense statutes of 34 jurisdictions). The great variation in self-defense law from one jurisdiction to another undermines the claim that it is "fundamental."[3]

Self-defense is not "engraved into our culture and upbringing." Petition for Certiorari, n. 8. Although established in Jewish, Ancient Greek, and English traditions, self-defense is inimical to basic Christian principles. Matthew 5:38-39 ("You have heard that it was said, 'An eye for a eye and a tooth for a tooth.' But I say to you, Do not resist one who is evil. But if anyone strikes you on the right cheek, turn to him the other also.") (Revised Standard). Early Christian philosophers therefore rejected self-defense. See Augustine, Letter 47, reprinted in I Select Library of Nicene & Post-Nicene Fathers 292-294 (Schaff ed. 1907).

Self-defense is inconsistent with significant strands of religious thought. Brock, Pacifism in the United States 889-919 (1968) (Quakers, Mennonites, Brethren); Hahn, "Love in Action," reprinted in Peace and Nonviolence 90-97 (Guinan ed. 1973) (Buddhism); Ballou, "Christian

[3] Petitioner's reference to the Universal Declaration of Human Rights, Petition at 8, is misleading. The declaration contains no right to self-defense.

Non-Resistance," reprinted in Peace and Nonviolence 8 ("a true Christian cannot . . . kill, maim or otherwise absolutely injure any human being, in personal self-defense, or for the sake of his family, or anything he holds dear."). See also Hanigan, Martin Luther King, Jr. and the Foundations of Nonviolence (1984); Gandhi, Collected Writings on Non-violent Resistance (1951).

Rowe's reliance on the Hansel and Gretel story in his Petition for Certiorari at 9 is especially inappropriate because life inside a maximum security prison is no fairy tale. Indiana's correctional officials properly prohibit self-defense as a complete defense in prison discipline cases to deter all fighting and to eliminate the need to adjudicate which party was the aggressor in every case.

The Court of Appeals agreed that even if there were some fundamental right to self-defense in other contexts, the legitimate penological concerns stated by Indiana's correctional officials would permit the existing policy in prison discipline cases. a-11; a-25; a-28. Indiana's rule that self-defense is not an absolute defense to culpability in a prison disciplinary proceeding, but may be used as mitigation, is designed to promote prison discipline and minimize violence.

> The Department of Correction has an Adult Disciplinary Policy and Procedures which govern disciplinary proceedings within the Department of Correction. Those policies and procedures do not specifically recognize self-defense as a defense to a rule violation simply because to do so, in my belief, would only encourage offenders to use force in the name of self-defense and would provide a recognized excuse for the use of force. Such

> written recognition of self-defense, in my opinion, would only add to the number of assaults by inmates on other inmates.

S.A. 3 (Affidavit of Defendant Watsen). This Court should defer to the judgment of the officials charged with administering prisons embodied in this rule. Turner v. Safley, 482 U.S. 78, 85 (1987); Block v. Rutherford, 468 U.S. 576, 584-585 (1984). Judge Ripple's view, in dissent, that permitting self-defense would somehow protect the "weak and vulnerable," a-17, is backward. Permitting self-defense as a complete defense would allow more brutalization of the "weak and vulnerable" by inmates who later would seek to justify their behavior as "self-defense" and give the disciplinary and judicial systems the task of sorting out who did what to whom in every case.

Respondents' position is consistent with the philosophical underpinnings of the doctrine of self-defense. In Lockean social contract theory, self-defense is available only when the state is not present to provide protection.

> Because the state exists for the protection of its members, the social contract includes a built-in limitation: each individual retains his or her natural rights for exercise in situations where appeal to established authority is impossible. Such a situation arises where aggression is sudden and immediate, so that state intervention cannot prevent its effect, and when the effect of the aggression threatened would be so severe and lasting that no subsequent state response could adequately substitute for prevention.

Fabricant, Homicide in Response to a Threat of Rape, 11 Golden Gate L. Rev. 945, 954 (1981) (emphasis supplied). In prisons, security personnel are almost always present or within shouting distance. The rule at issue in this case encourages prisoners to call for help rather than to exercise self-help, thus maintaining prison discipline and security.

CONCLUSION

For the reasons stated in this Opposition, this Court should deny the Petition for Certiorari.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term 1994

JOHN S. ROWE,

Petitioner,

v.

H. CHRISTIAN DEBRUYN, *ET AL.*,

Respondents.

PETITIONER'S REPLY TO
RESPONDENTS' BRIEF IN OPPOSITION

October 28, 1994

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Petitioner Rowe respectfully replies to Respondents' Brief in Opposition [hereinafter *Opposition Brief*] filed by Respondents. [hereinafter Prison Officers].

ARGUMENT

1. This case raises the question presented and the petitioner has not waived his substantive due process claim.

The question presented is exactly the question decided by the Court of Appeals:

> [Rowe] maintains that the IDOC's policy deprived him of a "fundamental liberty," and that "no man should be wrongfully convicted to satisfy the security concerns of a governmental entity." Thus, Rowe is actually arguing against the state's ability to deprive him of his right to claim self-defense at all. Such a claim is most properly characterized as substantive due process.

Rowe v. DeBruyn, 17 F.3d 1047, 1050-51 (7th Cir. 1994). The Prison Officers' argument that the case does not raise a substantive due process claim and that Rowe has waived such a claim is not supported by the record and is itself waived.[1]

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[1]The Prison Officers raise this argument for the first time in the *Opposition Brief*. They did not present their waiver argument in any of the three (3) briefs they filed in the Court of Appeals.

2. The evidence construed most favorably to Rowe does not support The Prison Officers' *post hoc* justifications that Rowe used excessive force and that they considered the fact of self-defense as a mitigating factor.

This case was terminated on summary judgment. The evidence construed most favorably to Rowe shows that, in 1991, the Prison Officers recognized that Rowe was the victim of a brutal attack and attempted rape but convicted him because they denied him the right to raise the defense of self-defense. "[Rowe] did have a human right to protect himself, but the Department of Correction doesn't have an allowance for that." *Deposition of Watson* at 38.

The Prison Officers' *post hoc* arguments, raised for the first time during the course of this litigation, are inherently suspect and must be rejected. *N.L.R.B. v. Indianapolis Mack Sales and Srvc., Inc.*, 802 F.2d 280, 285 (7th Cir. 1986) ("[post hoc justifications] made after the initial decision and in support of the application for enforcement are inherently suspect and do not merit our consideration").

If the Prison Officers really believed, in 1991, that Rowe had used excessive force, they must have incorporated their findings and reasons in the record.[2] Yet, the Prison Officers' decision and finding was devoid

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[2]*See Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (the conduct adjustment boards shall create a record containing evidence upon which a prisoner is found guilty and the reasons for the imposition of a guilty finding); *Chavis v. Rowe*, 643 F.2d 1281, 1286 (7th Cir. 1981) (the prison conduct adjustment boards shall provide prisoners "with a written statement as to the evidence relied on and reasons for the disciplinary action"), *cert. denied sub nom. Boles v. Chavis*, 454 U.S. 907 (1981).

of any allegation that Rowe had used excessive force. Instead, they found Rowe guilty because "[t]here is no self-defense policy for offenders in I.D.O.C." (AAB-21).[3]

Under the foregoing circumstances, this Court cannot assume the truth of the Prison Officers' *post hoc* justifications-- or, at least, it cannot do so at this stage of the proceeding. *Garnack v. Continental Casualty Co.*, 977 F.2d 1143, 1145 (7th Cir. 1992) (at the summary judgement stage the court should construe all facts most favorably to nonmovant with all reasonable inferences drawn in nonmovant's favor).

3. The Prison Officers deprived Rowe of a protected liberty interest.[4]

The Prison Officers argue that one year after Rowe was sentenced, the threat that any part of Rowe's sentence would be imposed was eliminated. Even though Rowe's sentence was originally suspended, Rowe was later confined to a restrictive, disciplinary unit because a subsequent sentence imposed upon him was enhanced due to this conviction. (AAB-14). Thus, the suggestion, in the *Opposition Brief* at i, that Rowe received "no punishment" is simply incorrect.

In their summary judgment motion, the Prison Officers did not challenge the fact that Rowe's CAB conviction deprived him of a protected liberty interest. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (a

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[3]Citations to the Appendix in Rowe's Appellant Brief, filed in the Court of Appeals, are shown as "AAB-___."

[4]This point is presented in reply to the *Opposition Brief*. Rowe is not pursuing a procedural due process claim.

summary judgment "movant always bears the initial burden of informing the district court of the basis for its motion"). The district court reached this issue, *sua sponte*, and held Rowe was not deprived of a protected liberty interest. (a-29).[5] The Court of Appeals overruled: "In our view, Rowe's punishment, although suspended, constitutes 'consequences visited on the prisoner that are qualitatively different from the punishment characteristically suffered by a person convicted of crime.'" *Rowe*, 17 F.3d at 1053 (quoting *Vitek v. Jones*, 445 U.S. 480, 493 (1980)).

It was only after the Court of Appeals issued its opinion that, for the first time, the Prison Officers claimed Rowe had not sustained a loss of a protected liberty interest.[6] This argument is incorrect and is waived.

Finally, regardless of the status of the punishment imposed, Rowe is entitled to seek, *at least*, nominal and perhaps punitive damages, *Carey v. Piphus*, 435 U.S. 247, 266 (1978), and the expungement of his disciplinary records. *Ware v. Heyne*, 575 F.2d 593, 595 (7th Cir. 1978).

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[5]Citations to the Appendix in the Petition are shown as "a-____."

[6]*See* Appellees-Respondents' Petition for Rehearing filed in the Court of Appeals.

4. This petition presents an important and fundamental question of whether a prisoner being attacked and raped has a fundamental right, protected by the due process clause of the fourteenth amendment, to defend himself.

The Prison Officers recognize that self-defense is established in Jewish, Ancient Greek, and English traditions, but argue that it is "inimical to basic Christian principles. They quote Matthew 5:38-39, which rejects the principle of "an eye for an eye." The "eye for an eye" standard, however, is a principle of vengeance. Self-defense is a measure to prevent the loss of the first "eye."[7] Further, American law is derived not from the Christian principles, *see* U.S. Const. amend. I, but from English common law. Under English common law, self-defense is "the primary law of nature, so is not, neither can it be in fact, taken away by the law of society." 2 H. Broom, *Commentaries on the Laws of England with Notes by William Wait* 3 (1875) Moreover, all philosophies of peaceful non-resistance provide that such a course of conduct must be a personal moral choice and cannot be imposed by the state.

True, the *Universal Declaration of Human Rights* does not refer to "self-defense." It does, however, recognize that "[e]veryone has the right to life, liberty and security of person." *Universal Declaration of Human Rights* art. 3. But, without the right to defend

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[7]The Prison Officers' citation to Matthew 5:38-39 ("if anyone strikes you on the right cheek, turn to him the other also") is disingenuous. First, if this was the principle under which the prison were being operated, the Prison Officers had no reason to punish Rowe for striking his putative rapist-- or, for that matter, to punish his attacker. Second, being raped is a far cry from a slap on the cheek.

life, the rights to life, liberty, and security would be illusory.[8]

Self-defense is widely recognized by the states. The Prison Officers have not cited a single state in which self-defense is not recognized. In fact, their research discloses that at least 34 states recognize self-defense. The fact that there are variations to self-defense laws does not make the right any less fundamental.

Allowing prisoners to raise the defense of self-defense would not encourage prisoner-to-prisoner violence. However, "to forbid all resistance to all threats to life and bodily integrity is not to ensure a lack of violence . . ., but to leave the weak and the vulnerable the easy prey of the strong and the vicious." *Rowe*, 17 F.3d at 1055 (Ripple, J., dissenting). If prison authorities have to hold a hearing to convict a prisoner whom they claim battered another prisoner, they can, and must, equally hold a hearing to determine whether a claim of self-defense is legitimate. After all, the constitution requires very little to uphold the decision of prison conduct adjustment boards. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) ("some evidence" must support the decision).

The Prison Officers' argument that this Court should defer to their administrative discretion in balancing the state's penological interest viz-a-viz Rowe's right to defend himself is unpersuasive, because "deference to the administrative expertise and discretionary authority of correctional officials must be schooled, not absolute." *Campbell v. Miller*, 787 F.2d

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[8]The Prison Officers criticize Rowe's citation to Grimm, *Hansel and Gretel*, by arguing that life inside a maximum security prison is no fairy tale. That makes for good prose but little reason. *Hansel and Gretel* was cited for the proposition that self-defense is engraved into our culture and upbringing.

217, 227 n.17 (7th Cir. 1986). After all, federal courts must not "abdicate [their] constitutional responsibility to delineate and protect fundamental liberties." *Pell v. Procunier*, 417 U.S. 817, 827 (1974). Further, no governmental purpose which allows an innocent person, *albeit* a prisoner, to be convicted and punished in the name of security can ever be legitimate. A state can never legitimately require an individual to passively submit to forcible rape to advance its security concerns.

Finally, the great fallacy in the Prison Officers' brief is their claim that "[i]n prison, security personnel are almost always present or within shouting distance." *Opposition Brief* at 12.[9] The facts of this case demonstrate that this is simply not so. The record shows that as Evans tried to rape Rowe, Rowe repeatedly screamed for help, but no officer responded. (AAB-17 to -19). Eventually, another prisoner, Perez, heard Rowe's pleas for help and came to his rescue. Rowe and Perez together were able to eject Evans from Rowe's cell. *Id.* After ejecting Evans from his cell, Rowe sought out an officer and demanded action. "Officer Ray said, 'Well what do you want me do?'" *Id.* at 19. "Correctional Officer Robert Ray did not have a radio on, nor did he make any effort to investigate [Rowe's] pleas for help, nor did he ever offer [Rowe] assistance." *Id.*

Lack of protection by prison authorities is "a situation that, the cases of [the Seventh Circuit] make clear, occurs with some frequency." *Rowe*, 17 F.3d at 1055 (Ripple, J., dissenting). Moreover, just a few

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[9]The Prison Officers claim, *without* citation to the record, that "[t]he fight was broken up by guards and another inmate." *Opposition Brief* at 2. This assertion is absolutely untrue and unsupported by the record. Despite Rowe's pleas for help, *no* guard came to his assistance. (AAB-17 to -19)

months ago the Seventh Circuit, at the urging of Indiana correctional officers, upheld a jury instruction that prison officers are not constitutionally required to protect prisoners from prisoner-to-prisoner violence if it is not *easy* for them to do so. *Gibbs v. Franklin*, 18 F.3d 521 (7th Cir. 1994), *vacated and remanded*, ___ U.S. ___, 63 USLW 3291, 1994 WL 286921 (1994).

> It is indeed a novel proposition of constitutional law to hold that a state, having deprived a person of liberty according to law, can further punish that individual for attempting to stay alive, even when the state itself is not ready, willing, or capable of assuming that responsibility by substituting its own strong arm for that of the prisoner-victim.

Rowe, 17 F.3d at 1055-56 (Ripple, J., dissenting).

Because of the exceptional importance of the issue presented and its impact on the lives of prisoners and the conduct of prison administration, this Court should grant certiorari and, for the first time, hold that the right to self-defense is fundamental and extends to prisoners facing serious injury or death.

CONCLUSION

For the foregoing reasons, Petitioner John S. Rowe respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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